Internal Revenue Service

memorandum

date: August 21, 1991

to: Chief, Appeals
San Francisco

from: Charles Checchi
Associate Chief

subject: Appeal of Denial for Request of Technical Advice: [redacted]

I have reviewed the enclosed case file at the request of Assistant Chief Ron Wise. The facts of the dispute are appropriately stated in the attached memorandum prepared by the Appeals Officer and they are presumed to be accurate and not at issue. My analysis and recommendation follow:

I. Issue

The sole issue is whether §280A serves to limit the deduction of all the taxpayer's rental losses attributable to property in which her co-owner brother resides without the payment of rent.

II. Legal Analysis

The general rule of §280A(a) provides that no deduction otherwise allowable under Chapter 1 (income tax) shall be allowed with respect to the use of a dwelling which is used by the taxpayer during the taxable year as a residence.

§280A(d) defines the term "use as a residence" as a dwelling unit used by the taxpayer for personal purposes for a number of days which exceeds the greater of 14 days or 10% of the number of days rented at a fair rental. The term "personal purposes" is defined in §280A(d)(2)(A) as follows:

> The taxpayer shall be deemed to have used a dwelling for personal purposes for a day if, for any part of such day, the unit is used for personal purposes by the taxpayer or any other person who has an interest in such unit or to family members [emphasis supplied].

Since the co-owner brother resided rent free for the entire year, the number of days used for personal purposes exceeds both 14 or 37 days (365 days X 10%) and the dwelling would be considered under §280A as used as a residence.

The taxpayer argues that §280A(d)(3)(A) provides that the rental of a dwelling unit to any person (including family members) will not constitute personal use if the dwelling unit is rented at a fair rental for use as the family member's principal residence.

First, there is case law in support of the application of §280A to rental situations. In the case of Zane John Semander v. Comm., TC Memo 1982-25, a taxpayer who rented out a portion of his residence was subject to §280A. As were taxpayers who rented one of their duplex units to their son where fair rental payments could not be determined. D & A Smith, 50 TCM 904.

Second, it appears that §280A(d)(3)(A) is not applicable due to the facts of this case. Herein, the facts are that the co-owner family member did use the property as his principal residence, but paid no rent. The Appeals Officer's interpretation of §280A(d) is correct. The intent of the subsection is to allow taxpayers to obtain deductions (despite the family attribution rules) provided that the property is used as their principal residence and they paid a fair rental amount. It does not override the attribution rules when the holder of an interest, or family members reside "rent free."

If it were subsequently determined that a fair rental value was paid by the brother, either in cash or in kind, the application of §280A(d)(3)(B)(i) would apply. It provides that if a lessee, whether a family member or not, is the holder of an interest in the unit, his use of the unit for personal purposes will be attributed to the taxpayer unless the rental arrangement is pursuant to a statutorily defined shared equity financing agreement. The available facts strongly suggest that no written arrangement is in effect. The very existence of this subsection also supports the Government's contention that §280(d)(3)(A) was not intended to fit the factual pattern encountered for co-owners.

However, one substantial factor to be considered is that a Court could possibly conclude that the residing co-owner's portion of the house is considered to be one "dwelling unit" and the remainder of the house considered another "dwelling unit." The Regs. at 1.280A-1(c) define dwelling unit and state that a single structure may contain more than one dwelling unit. It also provides an example where a basement contained basic living accommodations and constituted a separate dwelling unit. Basic living accommodations include sleeping space, toilet, and cooking facilities. Upper and lower units of a single-frame duplex were treated as two separate dwelling units in the case of Gorad v. Comm., 42TCM 1569.

The facts in the instant case are distinguishable in that separate sleeping and toilet facilities may well exist, but the cooking facilities are shared. Therefore, the Government has an excellent argument to refute any contention that the house consists of more than one dwelling unit.

III. Conclusion

I would recommend that you sustain the Appeals Officer's denial for request of technical advise. The taxpayer has not provided sufficient authority to establish a controversy significant enough to warrant referral.

As a side note, I would recommend that the negligence penalty could be conceded in full by the Government in this instance, as the underlying issue is technically complex.

Internal Revenue Service

memorandum

date: April 29, 1991

to: Chief, San Francisco Appeals Office

Through: Charles Checchi, Associate Chief

from: Geraldine Melick,
Appeals Officer

---

subject: Taxpayer Appeal of Decision Not to Seek Technical Advice.

The taxpayer requested technical advice in a letter received by Appeals on April 10, 1991. Technical advice was denied by Appeals Officer verbally on April 16, 1991. The taxpayer appealed the decision not to seek technical advice in a letter received by Appeals on April 23, 1991. The proposed denial of taxpayer's appeal is hereby submitted to the Chief, Appeals Office pursuant to Rev. Proc 1990-1.

Taxpayer: [redacted]
Tax Year: [redacted]

I. Issue:

Whether a rental loss claimed by the taxpayer is subject to the limitations of I.R.C. Section 280A.

II. Findings of Fact:
III. Law and Argument:

In [redacted], [redacted] and wife, [redacted] and [redacted] purchased, as equal 1/3 owners, a single family, four bedroom residence. The three owners are siblings. In [redacted] his wife and two children, resided in the dwelling for the entire year as their principal residence. Also, in [redacted] two of the bedrooms along with kitchen and living area to be shared with the owners, were rented out to non-owner tenants. [redacted] and [redacted] each deducted their full 1/3 share of expenses of the property and are each depreciating a full 1/3 of the building.

I.R.C. Section 280A(a) "General Rule. - Except as otherwise provided in this section, in the case of a taxpayer who is an individual or S corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable

year as a residence." Proposed Regulations Section 1.280A-1(c) defines "dwelling unit" as a house, apartment, condominium, mobile home, boat, or similar property, which provides basic living accommodations such as sleeping space, toilet, and cooking facilities. Since the property at issue has one kitchen, it is deemed a single "dwelling unit." Section 280A(d)- "(1) In general- for purposes of this section, a taxpayer uses a dwelling unit during the taxable year as a residence if he uses such unit (or portion thereof) for personal purposes for a number of days which exceeds the greater of- (A) 14 days or (B) 10 percent of the number of days during such year for which such unit is rented at a fair rental. For purposes of paragraph (B), a unit shall not be treated as rented at a fair rental for any day for which it is used for personal purposes. (2) Personal Use of Unit- For purposes of this Section, the taxpayer shall be deemed to have used a dwelling unit for personal purposes for a day if, for any part of such day, the unit is used- (A) for personal purposes by the taxpayer or any other person who has an interest in such unit, or by any member of the family (as defined in Section 267(c)(4)) of the taxpayer or such other person." Therefore, personal use by one owner equates to personal use by all owners. Since [redacted] used the "dwelling unit" as a principal residence for the entire year, limitations pursuant to Section 280A are invoked for all 3 owners.

The taxpayer argues that 280A(d) as amended by P.L. 97-119 provided that a taxpayer's rental of a dwelling unit to any person (including family members) will not constitute personal use by the taxpayer if the dwelling unit is rented at a fair rental for use as the family member's principal residence. The amendment has no application in this case. The taxpayer is deemed to have personal use of the "dwelling unit" not because she rented to a relative - indeed, her brother who resided in the "dwelling unit" paid no rent. She is deemed to have personal use of the "dwelling unit" because an owner of the property resided in the dwelling unit.

V. Conclusion:

As shown above, the issue is resolved per the statute. It is, therefore, recommended that the taxpayer's appeal of decision not to seek technical advice be denied.

Geraldine Melick
Appeals Officer